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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1962

## No. 918

PARTENWEEDEREI, MS. BELGRANO, and RUDOLPH A. OETKER,
*Petitioners,*
vs.
BRADY-HAMILTON STEVEDORE COMPANY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case December 11, 1962 and amended January 29, 1963, as to which rehearing was denied January 29, 1963.

## OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon is reported at 188 F. Supp. 605, 1960

A.M.C. 1641 and set forth in the Appendix, *infra*, at pages 1-12. The first opinion of the United States Court of Appeals for the Ninth Circuit is reported at 299 F. 2d 897, 1962 A.M.C. 1327 and set forth in the Appendix, *infra*, at pages 13-27. The subsequent orders of the Court of Appeals vacating the judgment and deferring resubmission of the cause are reported at 302 F. 2d 730, 1962 A.M.C. 1916 and set forth in the Appendix, *infra*, at pages 28-30. The subsequent opinion of the Court of Appeals on rehearing is not yet reported but is set forth in the Appendix, *infra*, at pages 31-33.

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## JURISDICTION

On February 8, 1962, the Court of Appeals entered its first judgment, reversing the decision of the district court, which had awarded damages to Weigel, an injured longshoreman, against petitioners, owners and operators of a vessel, and had allowed indemnity over against respondent, the employer of Weigel (R. 600). Petitioner filed a timely petition for rehearing (R. 601), which was granted April 9, 1962 (R. 611) and, after briefing and oral argument, the Court of Appeals, on May 21, 1962 (R. 614; Appendix, 28) vacated its judgment with respect to the indemnity decree, which affected only the parties here, and withheld its decision on the merits of the petition for rehearing pending disposition by the Supreme Court of the United States of Weigel's petition for certiorari. On December 11, 1962, following denial of Weigel's petition for certiorari, the Court of Appeals entered judgment again reversing the indemnity decree

(R. 621; Appendix 34). Petitioner then filed a timely petition for rehearing (R. 622), which was denied by an order entered January 29, 1963 (R. 629; Appendix 36), and the decision of the Court of Appeals thereupon became final. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

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## QUESTION PRESENTED

May the Court of Appeals refuse to decide a question of law which arises for the first time in the litigation as a consequence of its reversal of the District Court and *at the same time* by its order of remand preclude the District Court from considering the question, notwithstanding that the question of law is admittedly germane to the disposition of the case?

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## STATEMENT OF THE CASE

George Weigel, a longshoreman employed by respondent, sued petitioners for an injury caused by stevedoring operations on their vessel. Petitioners impleaded the respondent, the stevedore contractor. Jurisdiction in admiralty was based upon 28 U.S.C. 1333 and the maritime character of the claims. Weigel secured a decree against petitioners, who, in turn, secured a decree for indemnity against the stevedore. The indemnity decree (R. 54) granted petitioners not only the sum awarded Weigel but also the attorneys' fees and expenses of petitioners in defending Weigel's suit, amounting to $8,735.97 and interest. In addition the decree provided:

> "The foregoing does not include expenses and attorneys' fees which may be incurred by petitioners in an appeal to the Court of Appeals, as to which the right is reserved to petitioners to apply to the Court of Appeals, or after mandate to this Court, for allowance for such costs and expenses."

The decision in favor of Weigel was appealed by petitioners and respondents. The Court of Appeals reversed Weigel's decree for damages as against petitioners and, for that reason, also summarily reversed the entire indemnity decree against his negligent employer, respondent. Thus, the Court of Appeals summarily vitiated the portion of the lower court's judgment which required respondent to indemnify petitioners for their litigation expenses incurred in resisting the claims of Weigel, which have now been rejected but would have been solely borne by respondent if petitioner had not been successful.

Petitioners filed a petition for rehearing (R. 601), calling the attention of the Court of Appeals to the effect of its summary disposition of the indemnity decree. The petition was granted (R. 611) and the question of petitioners' right to be indemnified in the amount of their litigation expenses was briefed and orally argued. Upon submission of the matter it appeared that Weigel would petition this Court for a writ of certiorari. Since the action of this Court on his petition might render moot the question presented by the petition for rehearing, the Court of Appeals refrained from deciding the issues before it and held the matter in abeyance.

Weigel's petition for certiorari was denied (R. 616). The Court of Appeals then rendered an opinion (R. 618;

Appendix 31) on December 14, 1962, refusing to decide the merits of the indemnity question before it. Instead, the Court concluded that petitioners had not properly preserved the question, in that the District Court had not considered petitioners' right to recover its litigation expenses as against Weigel's negligent employer in the eventuality that Weigel's claims were later rejected.

A second petition for rehearing was filed by petitioners (R. 622). Astonished by the pivot upon which the Court of Appeals had turned its decision, they brought to its attention the following:

1. There was no reason for the District Court to consider petitioner's rights to recover its litigation expenses in its indemnity action against respondent if Weigel's claims were defeated, since the District Court had concluded, and entered its decree accordingly, that Weigel's claims were meritorious.

2. The order of the District Court, by preserving the right of petitioner to recover further litigation expenses incurred as a result of the appeals which were to be taken from the District Court decision, clearly recognized the need to preserve all questions respecting indemnity for such expenses, depending upon the development of such appeals of the various parties to the litigation.

Petitioners expressly asked the Court of Appeals, if it did not wish to decide the matter, to remand to the District Court for further proceedings there. No argument was allowed on this petition for rehearing and the Court entered its order denying the petition on January 29, 1963 (R. 629; Appendix 36).

## REASONS FOR GRANTING THE WRIT

The writ should be granted because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision to prevent disorderly procedure in the lower Federal Courts.[1] The Court of Appeals, by irregular and disorderly procedure, has deprived petitioners of relief which they had won below and has then prevented them from defending their right to retain this relief by refusing to decide or permit decision of an important question of admiralty law raised by respondent's challenge to petitioners' right to retain the indemnity award of litigation expenses.[2] It has thus de-

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[1] See Rule 19, 1. (b), Supreme Court Rules. Petitioners are not unmindful that the decision of the Court of Appeals is evidently in conflict with a decision of the Court of Appeals for the Second Circuit, *Paliaga v. Luckenbach S.S. Co. v. Turner & Blanchard, Inc.*, 301 F.2d 403, 1962 A.M.C. 1632, which arose from a very similar situation. In *Paliaga* the shipowner succeeded during trial in having the impleaded stevedore settle with the injured man, at the stevedore's expense. Despite the disposition of the longshoreman's injury claim at no further expense to it, the shipowner sought to go forward to seek indemnity for its past defense expenses. The district court refused upon the ground, among others, that such relief had not been specifically prayed for. The Court of Appeals reversed and ordered adjudication of this issue.

We assume, however, that this Court's action based on conflicts between the circuits is appropriate where a question is unsettled by reason of a genuine conflict of rule or principle and not where, as here, the rule is thoroughly settled and the departure of the Court of Appeals from accepted practice appears to call for the summary exercise of this Court's supervisory power rather than a reexamination of the rule or practice.

[2] The applications to this Court for certiorari for several years past have reflected the large volume of suits in which the longshoreman sues the vessel owner and the latter impleads the longshoreman's employer. The cases which this Court has decided in the field, beginning with *Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation*, 350 U.S. 124, and the many reported lower court cases following that decision illustrate how typically the

nied petitioners due process of law and has done this under the very guise and pretext of orderly procedure.

Petitioners are not asking this Court to resolve the merits of the important indemnity question raised by this litigation. Petitioners recognize that a question of such far-reaching importance for an entire industry should be carefully considered in the first instance by the trial court so that the appellate courts, when called upon to settle the law, may have available for their consideration the considered views of the court most frequently confronted with the problem. Thus there is no disagreement between petitioners and the appellate courts as to what constitutes orderly procedure.

Petitioners do protest, however, the action of the Court of Appeals which effectively prevents them from obtaining the orderly proceedings required in the premises. By such action the Court of Appeals disorderly and capriciously prevents petitioners from having an important question decided below in the very case in which it is most sharply presented and ripe for decision. The only

longshoreman is injured through some fault of his employer, for which the vessel may be required to respond but may recover from the employer. Thus the shipowner is a conduit for liability. Where the longshoreman has been injured by his employer's breach of his contract obligation of care, the employer should assume the defense of the vessel. The basic right to indemnity for defense litigation expenses is quite settled. See e.g., *Dalen Roderer AVD Dalen v. Maher*, 303 F.2d 565, 1962 A.M.C. 1944 (4th Cir.), *Paliaga v. Luckenbach S.S. Co.*, 301 F.2d 403, 1962 A.M.C. 1632 (2d Cir.) and cases cited therein. But so long as the contention made by the employer in this case can be sustained, the employer is loath to assume the defense because the law has not been established as to litigation expenses of a successful defense and he may be fortunate enough to be the beneficiary of such a defense by the shipowner, upon whom he can then leave the heavy burden of litigation expenses.

excuse given for this action is an unsupportable analysis of the record to establish that petitioners had not preserved the question. This analysis is unsupportable because the question could not have been raised until the Court of Appeals had acted upon the decree in Weigel's favor.

The refusal of the Court of Appeals to remand the case to the District Court for consideration of a controlling question which did not arise and hence was not presented there is contrary to long settled and accepted practice well known to this Court and illustrated in its opinions. See, e.g., *Aetna Casualty & Surety Company, et al. v. Flowers*, 330 U.S. 464, 468; *Marconi Wireless Tel. Co. v. Simon*, 246 U.S. 46, 57; *Wiggins Ferry Co. v. Ohio & Mississippi R. Co.*, 142 U.S. 396, 415.[3] All these cases involve instances where this Court has corrected misconceptions of the lower court and remanded the cases to lower courts to pass upon contentions not raised and passed upon below because they were unnecessary in view of the lower courts' original decisions. The departure from the accepted practice is particularly striking and inequitable where, as here, the Court of Appeals has had the question fully briefed and argued and has then declined to decide it on the very ground that the question was not considered below.

The Court of Appeals grounded its refusal to decide the indemnity question upon the conclusion that the plead-

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[3] As this case also points out, "Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice . . ."

ings below were not sufficiently broad to embrace the question when it eventually arose. The Court acknowledged that the impleading petition contained the usual prayer for "other and further relief" but took its stand squarely upon the failure of the District Court's pre-trial order to repeat this prayer and upon the fact that the District Court, in summarizing the contentions of the parties in its pre-trial order, stated that petitioners claimed indemnity "if [they] should be held liable in this case to libelant". This technicality was all the more amazing because the question of law involved required no different or further trial of fact issues than had already been had. It requires no citation to remind the Court that liberality of construction of pleadings has been the rule of the Federal Courts in all cases, at least since the adoption of the Federal Rules of Civil Procedure. The practice in admiralty cases has certainly been no less liberal than in others. See *Dupont v. Vance*, 19 How. 162, 171 (1857)[6] and *Archawski v. Hanioti*, 350 U.S. 532, 534, 1956 A.M.C. 742, 743.

If petitioners here had prevailed in the District Court and defeated Weigel's claim there, they could, in the state of their pleadings and the record, have requested judgment against respondent for their expenses of litigation and the District Court would have been required to decide the question which in fact first arose at the appel-

[6] "The rules of pleading in the admiralty are exceedingly simple and free from technical requirements. It is incumbent on the libelant to propound with distinctness the substantive facts on which he relies; to pray, either specially or generally, for the relief appropriate to them; and to ask for such process of the court as is suited to the action, whether in rem or in personam."

late level. If the sufficiency of the pleadings and the record had then been challenged, petitioner had the right, under Rule 23 of the Rules of Practice in Admiralty and Maritime cases, to set forth supplementary matter. If necessary, a motion to amend appropriately the District Court's pre-trial order could have been entertained, as actually provided for in that order (R. 15). The granting of such motions rests in the sound discretion of the District Court, under its rules of practice, depending upon the facts and circumstances of the litigation as then known to it. Thus, an additional and more aggravated evil of the action of the Court of Appeals is its arrogation of the power to decide a question concerning the propriety of practice in the District Court without the benefit of the views of the District Court as to the appropriateness of such practice—all under the guise of the need of preserving orderly proceedings in the administration of justice![5]

If there is any defense for the Court of Appeals' decision it must be by reliance on the technical niceties for which the common law lawyer was once known. Yet this Court has repeatedly made known the disfavor with which

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[5] It is inconceivable that the Court of Appeals would reverse a decision of the District Court granting the motions described above, since it is a well-established rule of federal practice that decisions with respect to such procedural matters, which rest within the sound discretion of the District Judge, will not be set aside on appeal without the showing of substantial, arbitrary and capricious abuse of discretion. See, e.g., *Heay v. Phillips*, 201 F.2d 220, 222 (9th Cir.) and cases cited therein; *Boudreau v. United States*, 250 F.2d 209, 211, 1958 A.M.C. 48, 50 (9th Cir.) and cases cited therein. And see *Northwest Orient Airlines v. Gorter*, 254 F.2d 652 (9th Cir.), indicating that the appellate court will probably be more likely to find abuse where amendment is denied.

it looks upon excessive technicality in the procedural decisions of the lower courts, particularly where the effect is, as here, to deprive the party of a fair opportunity to have a hearing and decision upon the case. In *Hoiness v. United States*, 335 U.S. 297, 1948 A.M.C. 1909, the Court of Appeals for the Ninth Circuit had read a notice of appeal with the same excessive technicality with which it read the pleadings and the District Court's pre-trial order here.[6] And in both *United States v. Arizona*, 346 U.S. 907 and *State Farm Mutual Automobile Ins. Co. v. Palmer*, 350 U.S. 944 this Court granted certiorari and summarily reversed at the same time for similar excessive technicalities.

There is no question as to the power, and indeed the duty, of the Court of Appeals to set aside so much of the indemnity award as represented Weigel's damages, once it had reversed Weigel's decree and removed the foundation for that portion of the indemnity decree. But when the Court reversed the decree in its entirety and took away that part of petitioners' damages representing litigation expenses, it did so without hearing or consideration and its continued refusal, not only to decide the merits of petitioners' protest against the deprivation of their property, but also to permit the matter to be heard elsewhere, is a shocking denial of due process of law.

Although the circumstances are quite different, the principle involved is the same as in *Brinkerhoff-Faris*

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[6]The defect of the notice of appeal, which referred to the wrong order, "was of such a technical nature that the Court of Appeals should have disregarded it . . . ." 335 U.S. at 300, 1948 A.M.C. at 1911.

*Trust & Savings Company v. Hill,* 281 U.S. 673. There the company had asked the state courts for equitable relief from a claimed denial of equal protection of the laws in respect of taxation. The state supreme court held that a certain legal remedy had been available to the company, overruling its own earlier case holding that such remedy did not exist, and on that ground denied relief, although it was now too late for the company to avail itself of the new-found legal remedy. The company filed a petition for rehearing raising the question of due process of law, which was denied. This court granted certiorari and, in an opinion by Mr. Justice Brandeis, held that the question was properly raised by the petition for rehearing, when it first became important in the case, and reversed, holding that the state court, in denying the company an opportunity to defend its rights because it did not seek an earlier remedy not then available and not now open to it, had deprived the company of its property without "due process of law—using the term in its primary sense of an opportunity to be heard and to defend its substantive right". p. 678. Likewise the Court of Appeals here has not only vitiated, without consideration of the merits, relief granted petitioners by the District Court, but also has denied petitioners the opportunity to be heard in any court so as to defend their asserted substantive right to recover from respondent the expenses of litigation incurred by petitioners in defeating the claims of respondent's employee, thereby relieving respondent from having to bear the full burden of such claims.

## CONCLUSION

By a disorderly procedure, unquestionably contrary to the usual and accepted course of judicial proceedings, the Court of Appeals has (1) refused to decide a controlling and important question of admiralty law; (2) deprived petitioners of their judgment for litigation expenses without consideration of the underlying legal basis therefor and, in so doing, has produced a result in conflict with the Court of Appeals for the Second Circuit;[7] (3) denied them the opportunity to be heard and to defend in the District Court their right to that judgment, notwithstanding that their right to such judgment was not susceptible to challenge until such time as the District Court's decision on Weigel's claim had been reversed by the Court of Appeals and (4) decided a question of District Court practice with respect to pleadings and the amendment thereof, without the benefit of the District Court's prior consideration as to the appropriate procedure to be followed in the premises. Petitioners submit that the action of the Court of Appeals is an aggravated abuse of judicial power. Petitioners do not ask this Court to decide the merits of their claim for indemnification. But petitioners do urge this Court to enforce orderly procedure so that the merits of their claim may be decided by a remand to the District Court for that purpose. We believe that the propriety of that course requires no further argument and that this Court should grant the writ and summarily reverse the judgment below, so far as it

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[7] See footnote 1, *supra*.

denies petitioners a remand for further proceedings in the District Court.

Dated, March 8, 1963.

Respectfully submitted,

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**(Appendix Follows)**